STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT, Respondent-Appellant, v DETROIT POLICE OFFICERS ASSOCIATION, Charging Party-Appellee.	UNPUBLISHED December 4, 2007 No. 268278 MERC LC No. 04-000001
CITY OF DETROIT, Respondent-Appellee, v DETROIT POLICE OFFICERS ASSOCIATION, Charging Party-Appellant.	No. 268425 MERC LC No. 04-000001

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In Docket No. 268278, respondent city of Detroit appeals as of right from an order of the Michigan Employment Relations Commission (MERC), which, among other things, ordered respondent to restore a suspended police officer, John Bennett, to his previous assignment. In Docket No. 268425, this Court ordered that charging party Detroit Police Officers Association's (DPOA) petition to enforce the MERC order proceed to a full hearing in the same manner as an appeal by right. We affirm the MERC order and grant the DPOA's petition for enforcement.

I. Factual Background

This case arises out of Officer Bennett's creation and operation of an Internet website, www.firejerryo.com, while Jerry Oliver was the police chief for respondent's police department. According to Officer Bennett's testimony in the MERC action, the website was created in October 2002, to provide a forum for police officers to express concerns regarding the police department and a source of information for the community. It primarily contained articles about the police department authored by Officer Bennett, but also included some comic relief and

"edgy" criticism of departmental officials. A "guestbook" was added from late 2002 to August or September 2003, which allowed anyone to express their thoughts.

In July 2003, Chief Oliver suspended Officer Bennett with pay. According to Officer Bennett, Chief Oliver told him that the website contained racial materials and, if he did not shut down the website, he would be suspended without pay. Officer Bennett continued to operate the website. In September 2003, after Chief Oliver prepared a memorandum recommending charges against Officer Bennett for various alleged rule violations, his suspension was changed to one without pay, with the approval of the Detroit Board of Commissioners. In October 2003, Officer Bennett answered questions about the website at a *Garrity*[1] interview conducted in the police department's internal affairs division.

In January 2004, the DPOA brought the instant MERC action. The DPOA charged respondent with violating MCL 423.210(1)(a) of the public employment relations act (PERA), MCL 423.201 *et seq.*, by (1) directing that Officer Bennett shut down the website (2) suspending Officer Bennett for creating and operating the website. In March 2004, while the MERC charge was pending, the police department began formal disciplinary proceedings against Officer Bennett for conduct unbecoming a police officer and neglect of duty relating to his operation of the website. The disciplinary charges were pending when an administrative law judge conducted an evidentiary hearing regarding the DPOA's charge. The administrative law judge found that respondent violated the PERA by suspending Officer Bennett for engaging in protected activity. He recommended that respondent and its officers, agents, and representatives be ordered to cease and desist from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by MCL 423.209, restore Officer Bennett to his previous assignment and make him whole for any losses, and provide notice to its employees. After reviewing and rejecting respondent's exceptions to the administrative law judge's decision, the MERC accepted the administrative law judge's findings and adopted the recommended order.

II. Respondent's Appeal

On appeal, respondent raises various factual and legal challenges to the MERC's decision, seeking reversal of the MERC order in its entirety. In general, we apply the following standards when reviewing a MERC decision:

> We review MERC decisions "pursuant to Const 1963, art 6, § 28, and MCL 423.216(e)." *Grandville Municipal Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). MERC's "findings of fact are conclusive if they are supported by competent**,** material, and substantial evidence on the record considered as a whole." *Id*. MERC's "legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Id.*, citing MCL 24.306(1)(a), (f). "In contrast to MERC's factual findings, its legal rulings 'are afforded a lesser degree of deference' because review of legal questions remains de novo, even in MERC

[1] *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967).

> cases." *St Clair Co Education Ass'n v St Clair Co Intermediate School Dist*, 245 Mich App 498, 513; 630 NW2d 909 (2001), quoting *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 403; 597 NW2d 284 (1999), and citing *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 357 n 8; 616 NW2d 677 (2000). [*Branch Co Bd of Comm'rs v Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003).]

Addressing first respondent's argument that the MERC committed a substantial and material error of law, we find respondent's reliance on the standards in *Garcetti v Ceballos*, ___ US ___; 126 S Ct 1951; 164 L Ed 2d 689 (2006), *Connick v Myers*, 461 US 138; 103 S Ct 1684; 75 L Ed 2d 708 (1983), and other federal cases that consider First Amendment retaliation claims under 42 USC 1983, to be misplaced because the DPOA charged only that respondent violated the PERA.

MCL 423.210(1) provides that "[i]t shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9." Section 9 provides:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice. [MCL 423.209.]

This statute basically adopted analogous provisions in the National Labor Relations Act (NLRA), 29 USC 151 *et seq.*, and, therefore, federal precedent can be considered as guidance in applying the statute. See *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 259-260; 215 NW2d 672 (1974). In mixed motive cases, such as this one, this Court has approved the MERC's use of the burden-shifting approach in *Nat'l Labor Relations Bd v Wright Line*, 662 F2d 899 (CA 1, 1981), which requires the charging party to demonstrate that protected conduct under the PERA was a motivating or substantial factor in the employer's action. *Michigan Ed Support Personnel Ass'n v Evart Pub Schools*, 125 Mich App 71, 74; 336 NW2d 235 (1983). Once this showing is made, the burden shifts to the employer to produce evidence that the same action would have taken place in the absence of the protected conduct. *Id.* Under this approach, if the employer, by credible evidence, meets the charging party's prima facie case, the burden shifts back to the charging party. *Id.* The "burdens of 'persuasion' and 'production' are not, as a practical matter, likely to be very important in most cases as decisions will usually turn on a weighing of the evidence." *Id.*

In *Nat'l Labor Relations Bd v Transportation Mgt Corp*, 462 US 393; 103 S Ct 2469; 76 L Ed 2d 667 (1983), overruled in part on other grounds *Director, Office of Workers' Compensation Programs, Dep't of Labor v Greenwich Collieries*, 512 US 267, 277; 114 S Ct 2251; 129 L Ed 2d 221 (1994), the United States Supreme Court partially disapproved of the burden imposed on the employer under *Wright Line, supra*, in employer motivation cases. Instead, the United States Supreme Court approved a test formulated by the National Labor Relations Board (NLRB) that first requires proof sufficient to support an inference that protected conduct motivated the employer's decision. The burden then shifts to the employer, in the nature

of an affirmative defense, to avoid the consequences of an NLRA violation by showing that it would have taken the same action for wholly permissible reasons and without regard to the impermissible motivation. See also *Arrow Electric Co, Inc v Nat'l Labor Relations Bd*, 155 F3d 762, 766 (CA 6, 1998).

More recently, in *Ingham Co v Capitol City Lodge No 141 of the Fraternal Order of Police, Labor Program, Inc*, 275 Mich App 133; 739 NW2d 95 (2007), this Court set forth a three-part test for situations where an employer claims to have applied a disciplinary rule to justify its actions:

> Under the first prong of the test, we look at whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under the PERA. Under the second prong, we look at whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule. Finally, under the third prong, we balance the diminution of the employees' rights because of application of the rule against the employer's interests that are protected by the rule. In addressing this final prong, we must remain cognizant that "'[it] is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."'" [*Id.*, at 141-142 (citations omitted).]

Having considered respondent's argument on appeal in light of the standards applicable to PERA claims, we are unpersuaded that the MERC committed a substantial and material error of law. The MERC's decision indicates that it was cognizant of the DPOA's burden to show a PERA violation and, if this burden was met, that the burden would be on respondent to demonstrate a legitimate and substantial business justification for suspending Officer Bennett. The MERC went beyond a mere consideration of whether a disciplinary rule could justify the suspension. Although finding a lack of support for respondent's position, the MERC also appropriately considered respondent's claim that Officer Bennett's statements undermined public confidence in its police department and had an adverse impact on its operation. See *News-Texan, Inc v Nat'l Labor Relations Bd*, 422 F2d 381, 385 (CA 5, 1970) (employee cannot act in a manner that disregards the employer's right to maintain discipline and efficient production).

We are also unpersuaded that the MERC's decision lacked competent, material, and substantial evidence on the whole record. Addressing first whether the DPOA established that respondent took action that adversely affected a protected activity within the meaning of MCL 423.209, the precise boundaries of concerted activities for "mutual aid and protection" have not been formulated. *Eastex, Inc v Nat'l Labor Relations Bd*, 437 US 556, 566-568; 98 S Ct 2505; 57 L Ed 2d 428 (1978). But employees are not precluded from seeking to improve terms and conditions of employment, or to otherwise improve their lot as employees, through channels outside the employee-employer relationship. *Id.* at 566-567. Further, an employer's selection of supervisors with immediate authority over employees can be a protected topic of protest. *Atlantic-Pacific Constr Co v Nat'l Labor Relations Bd*, 52 F3d 260, 263-264 (CA 9, 1995). The action of a single employee who intends to induce group activity can also constitute concerted activity under the "mutual aid or protection" provision. *Mobil Exploration & Producing US, Inc v Nat'l Labor Relations Bd*, 200 F3d 230, 238-239 (CA 5, 1999); see also *Ingham Co*, *supra*, 275 Mich App at 143-144.

Here, the DPOA's charge that respondent violated the PERA is not based on respondent's response to a particular communication or communications posted by Officer Bennett on the Internet, but rather on respondent's ban of an entire form of communication, namely, Officer Bennett's operation and use of his Internet website. Officer Bennett's testimony before the administrative law judge, if believed, indicated that the only option offered to him by Chief Oliver in July 2003 was that he would be suspended without pay if he did not shut down the Internet website. Although the DPOA did not offer documentary evidence of actual website pages, Officer Bennett's testimony regarding the type of information that he posted to the website about work conditions and union-related activities and the use of the "guestbook" for police officers to express their concerns supports the administrative law judge's finding that Officer Bennett was engaged in protected activity under MCL 423.209. Because respondent only took issue with certain statements on the website, it could reasonably be inferred from the evidence that the website as a whole was not conducted in such an abusive manner as to lose the protection of the PERA. See *Mobil Exploration & Producing US, Inc*, *supra*, 200 F3d at 238-239.

The MERC must give due deference to the administrative law judge's findings of credibility when conducting its review. *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 554-555; 517 NW2d 240 (1994). Therefore, we reject respondent's argument on appeal that the MERC should have found, based on the evidence, that the website was not a forum for concerted activity, but rather a forum for Officer Bennett to express personal dissatisfaction with Chief Oliver. Giving due deference to the administrative law judge's findings, it cannot be said that the MERC's finding of concerted activity protected by the PERA lacks substantial, material, and competent evidence on the whole record. The DPOA established that Officer Bennett, although acting alone, operated at least part of the website for a protected purpose, namely, to induce group activity for the mutual aid and protection of fellow police officers employed by respondent within the meaning of MCL 423.209.

Because there was evidence that Officer Bennett was not given an option to remove objectionable material, but rather was told to shut down the website or face a suspension without pay, we also conclude that the evidence supports an inference that Officer Bennett's protected right to engage in lawful concerted activities was adversely affected by the suspension. Therefore, we must consider whether respondent can avoid the consequence of the PERA violation by demonstrating that it would have suspended Officer Bennett in the absence of the protected activity. *Arrow Electric Co*, *supra*, 155 F3d at 766. An employee cannot act in a manner that disregards the employer's right to maintain discipline and efficient production. *News-Texan, Inc*, *supra*, 422 F2d at 385. Where the employer's action is based on disciplinary rules, the employer must show a legitimate and substantial business justification for instituting and applying the disciplinary rules. *Ingham Co*, *supra*, 275 Mich App at 149.

Here, the MERC considered respondent's various arguments that Officer Bennett posted statements on the website that undermined public confidence in the police department and had an adverse impact on its operations, as well as whether Officer Bennett violated the police department's rules and regulations regarding the conduct of police officers. Although acknowledging that respondent took issue with certain statements, the MERC found insufficient evidence for respondent's demand that Officer Bennett shut down the website and the suspension imposed for his failure to do.

We disagree with respondent's argument on appeal that it established a legitimate and substantial justification for Officer Bennett's suspension, grounded in disciplinary rules and regulations, based on the documentary evidence. The MERC was not required to accept the references to disciplinary rules in the recommended charges made by Chief Oliver in his September 4, 2003, memorandum to the Detroit Board of Commissioner, the statements made regarding departmental rules at the *Garrity* interview conducted in October 2003, or the references to disciplinary rules in the formal charges ultimately brought against respondent in March 2004, as adequate to determine whether the suspension could be justified under rules or regulations. Moreover, to the extent that respondent argues that it established grounds for suspending Officer Bennett that go beyond any rules or regulations, we find no merit to such a claim. It would be speculative to infer from the evidence that the operation of the website had an adverse effect on employees or undermined public confidence in the police department. Conjecture does not satisfy the requirement of substantial evidence. *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 126-127; 223 NW2d 283 (1974). The MERC's findings are conclusive if supported by substantial, material, and competent evidence on the whole record. *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 553-554; 581 NW2d 707 (1998); *Branch Co Bd of Comm'rs, supra*, 260 Mich App at 192-193.

Considering the evidence as a whole, we conclude that the MERC reasonably could conclude, as it did, that Officer Bennett was "suspended simply because he continued to operate the website" and that disciplining him for not shutting down the entire website violated the PERA. Because the MERC's decision is supported by competent, material, and substantial evidence on the whole record, and respondent has not demonstrated a substantial and material error of law, we affirm the MERC's decision.

III. DPOA's Petition to Enforce the MERC's Order

The enforcement and review provisions in the PERA are closely interrelated. *Kalamazoo City Ed Ass'n v Kalamazoo Pub Schools,* 406 Mich 579, 603; 281 NW2d 454 (1979). "In tandem, they form a cohesive procedure for seeking enforcement or review of MERC orders." *Id.* Because the parties' only arguments regarding the enforcement of the MERC's order pertain to the merits of its decision, and we have affirmed that decision, we grant the DPOA's petition to enforce that order pursuant to MCL 423.216(d).

We affirm the MERC's order in Docket No. 268278, and grant the DPOA's petition to enforce that order in Docket No. 268425.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood